UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 27, 2003
Decided April 4, 2003

Before

Hon. Richard A. Posner, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

Hon. Ann Claire Williams, Circuit Judge

No. 02-3849

LOUIS F. GAINES,
Plaintiff-Appellant

v.

WHITE RIVER ENVIRONMENTAL PARTNERSHIP, et al.,
Defendants-Appellees

Appeal from the United States District for the Southern District of Indiana, Indianapolis Division

No. 01 C 1158

David F. Hamilton, Judge

ORDER

Louis Gaines began working for the defendants ('White River') at their wastewater treatment plant in 1994. Since then, he as repeatedly sue White River for discrimination, resulting in several appeals that we have previously resolved. See e.g., *Gaines v. White River Environ. P'ship.* No. 00-3802, 2001 WL 298592 (7th Cir. March 23, 2001). In this lawsuit Gaines argues that he has been the victim of discrimination and retaliation, especially in regard to several key decisions made by White River--their alleged failure to promote him and their transferring him temporarily to a less desirable (and more dangerously) department. The district court granted summary judgment to the defendants. We affirm.

After an examination of the briefs and record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. See Fed. R. App. P. 34(a)(2).

After exhausting his administrative remedies by filing charges of discrimination with the EEOC and receiving right-to-sue, Gaines, an African-American in his 50's, filed this suit against White River. Gaines' complaint alleges numerous instances of discrimination, including that White River paid him less that white employees, credited him with less seniority than white employees, and assigned him additional undesirable duties. He argues that this conduct violated several civil rights statues, including 42 U.S.C. § 1981, Title VII of the Civil Rights of 1964, 42 U.S.C. § 2000e

et seq., the Age Discrimination in Employment Act, 29 U.S.C. § 621, et. seq., and 42 U.S.C. § 1983, and the Occupational Safety and Health Act, 29 U.S.C. §§ 651-78. (Gaines' complaint makes some additional allegations that he first raised in an EEOC charge filed in August 2001. But we have found no right-to-sue letter issued to Gaines on that charge in the record, and therefore those allegations appear to have been made prematurely.) Both parties subsequently filed cross-motions for summary judgment.

The district court granted summary judgment for White River on all Gaines' claims, and at the same time denied Gaines' summary judgment motion. The court held that many of Gaines' claims were time-barred either because he filed an EEOC charges containing those claims too late, or because he waited too long to file suit after receiving a right-to-sue letter. The court also held that Gaines failed to establish a prima facie case of discriminatory treatment under Title VII, the ADEA or § 1981, and had failed to establish a prima facie case of retaliation. Finally, the court held that Gaines failed to established a claim under § 1983 (because White River was not a state actor) or OSHA (because OSHA provides no private right of action).

Gaines argues first (without elaboration) that all of his discrimination and retaliation claims were timely and that district court erred when it concluded that some were time-barred. Title VII and the ADEA, however, require plaintiffs to meet strict deadlines: in Indiana, EEOC charges must be filed within 300 days of the alleged incident of race or sex discrimination, and within 180 days of

the alleged incident of age discrimination. *EEOC v. N. Gibson Sch. Corp.*, 266 F.3d 607, 617 (7th Cir. 2001) (ADEA); *Minor v. Ivy Tech State College*, 174 F.3d 855, 857 (7th Cir. 1999)(Title VII). Gaines waited until 2001 to file charges stemming from White River's alleged failure in 1994 and 1995 to offer him the same pay and seniority it offered white employees, well in excess of the 300-day limit for Title VII claims and 180-day limit for ADEA claims. Gaines also missed the deadline to file suit in the district court on his claim based upon his transfer to a less desirable department. After the EEOC issued his right-to-sue letter on that claim in July 1999, Gaines had 90 days to file suit in the district court, see *Grayson v. O'neill*, 308 F.3d 808, 817 (7th Cir. 2002), but he waited more than two years (until August 2001) before doing so. We agree with the district court that these claims are time-barred.

We disagree with the court, however, that the time for filing had lapsed on another claim-- based upon White River's alleged decision in October 2000 to promote a white employee rather than Gaines. Gaines filed the charge in January 2001--within both the 180-day deadline for filing a claim based upon age discrimination and the 300-day for filing a claim based on race or sex discrimination. He also timely filed this complaint in August 2001, less than 90 days after receiving his right-to-sue letter in May 2001. Therefore this failure-to-promote is not time barred.

Although many of Gaines' claims are time-barred, he made other claims of discrimination and

retaliation that are timely (in addition to his failure-to-promote claim). Most of these other claims involved changes in his work assignments or reprimands for disobeying orders. As for the merits of his timely claims, Gaines submitted no evidence under the direct method of proving discrimination or retaliation and, therefore, must proceed under the indirect method articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Under that approach, Gaines must first establish a *prima facie case.* The elements that Gaines must demonstrate to establish a prima facie case vary by claim, but one requirement common to all of Gaines' claims is that he offer evidence that he suffered an adverse employment action. See, *e.g., Lalvani v. Cook Co., Ill.*, 269 F.3d 875, 789 (7th Cir. 2001) (discrimination under Title or § 1981); *Koski v. Standex Int'l Corp.*, 397 F.3d 672, 676 (7th Cir. 2002) (discrimination under ADEA); *Stone v. City of Indianapolis Pub. Utils. Div.*, 281 F.3d 640, 644 (7th Cir.), cert. denied, 123 S. Ct. 79 (2002) (retaliation).

We agree with the district court's determination that Gaines failed to establish that he had suffered any adverse employment action. Most of the employment actions he challenges in this suit--the changed work assignments and reprimands -- resemble actions in one of his prior appeals. As we discussed in our prior order, none of these actions amounted to adverse employment actions because they did not materially change the terms or conditions of his employment. See, *Gaines, 2001 WL 298592,* at * 1; see also *Tyler v. Ispat Inland, Inc.*, 245 F.3d 969, 972-73 (7th Cir. 2001); *Oest v. Ill. Dep't of Corr.*, 240 F.3d 605, 613 (7th

Cir. 2001).

The only act that Gaines identified in this complaint that differs from the acts he alleged in his previous suit is White River's alleged decision to promote a white employee over him. Gaines admits, however, that he never applied for the promotion even though he knew about the opportunity to do so. (Plaintiff's Statement of Material Facts No In Dispute at ¶¶ 31-32. To establish that White River's failure to promote him amounted to an adverse employment action, Gaines must demonstrate that he applied for the promotion. *Grayson,* 317 F.3d at 748. His admission that he did not leaves him unable to establish a *prima facie* case, and

the district court therefore correctly granted summary judgment to White River on his Title VII, § 1981, and ADEA claims.

Summary judgment on Gaines' remaining two claims was also appropriate . First, Gaines submitted no evidence (and has not even argued) that White River acted under color of state law for purposes of his §1983 claim. *Gayman v. Principal Fin. Servs., Inc.,* 311 F.3d 851, 852 (7th Cir. 2002). Second, Gaines cannot state a claim under OSHA because that statue offers him no private right of action. *Am. Fed. Of Gov't Employees, AFL-CIO v. Rumsfield,* 312 F.3d 139, 144-45 (D.C. Cir. 2003); *Mason v. Ashland Exploration, Inc.,* 965 F.2d 1421, 1425 (7th Cir. 1992).

Finally, we note that we sanctioned Gaines in two of his previous appeals, once for appealing interlocutory orders and a second time for making spurious allegation against the district judge and defense counsel. While his argument in this appeal do not repeat his earlier errors, they border on the frivolous. We therefore warn Gaines any future appeal that raises frivolous arguments will result in further sanctions.

Accordingly, we affirm the judgment of the district court.